81-2180

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IN THE UNITED STATES SUPREME COURT

1982 TERM

DARLYS FOSTER STEED,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Whether the District Court's post jury verdict, fact-based determination that the evidence was insufficient to convict and consequent entry of judgment of acquittal should be accorded absolute deference upon a government appeal.

II. Whether the Fourth Circuit had authority to reverse the District Court's granting of a new trial in light of 18 U.S.C. §1291 requiring finality of judgments prior to appeal.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked on Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals upon its order dated March 25, 1982, pursuant to 28 U.S.C. 1254(1).

STATUTES

18 U.S.C. 1291:

The courts of appeals shall have jurisdiction of all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District

Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

18 U.S.C. 3731:

In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney

certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

STATEMENT OF THE CASE

In early January, 1977, Thomas Beasley, owner of a large tract of land in Floyd County, Virginia met with Frank Joe Steed, a land developer from Memphis, Tennessee, at the law offices of Donald Williams in Roanoke, Virginia. Dana Hockensmith, attorney for Frank Joe Steed, Williams, attorney for Thomas Beasley, and

were also present at this meeting. Darlys Foster Steed ("Steed") did not attend.

Those present engaged in a discussion which began on broad terms, initially entertaining the notion of developing the entire Beasley tract. From this starting point, the talks narrowed as a result of financial realities and the main thrust of the meeting that day became the development of a portion of Beasley's land. The talks culminated in an agreement by Thomas Beasley to sell a portion of his land to Parkway Development Corporation, an entity which Williams and Frank Joe Steed subsequently created. This development was to be accompanied by a legitimate filing with HUD, a condition on which Frank Joe Steed insisted, and which Williams believed could be met legally by way of a filing for an exemption. The agreement concerned only the development of one parcel of Beasley's tract, later to be called Park Ridge

Forest. No other offer to buy or option to sell the remainder of Beasley's land was made, and no discussion or contemplation of illegal activity took place at the meeting.

At the direction of Frank Joe Steed, Parkway Development Corporation was subsequently formed and Steed (Frank Joe Steed's wife), who had not attended the meeting in January, was designated its president. In the months that followed, Frank Joe Steed hired a bookkeeper, Clyde Parrish, a Project Dierctor, Lewis Allen, and spoke with a construction worker, Robert Batemen, about grading work needed at the development. Later, Frank Joe Steed hired Jack Atkinson to replace Lewis Allen.

In contrast to the active role assumed by Frank Joe Steed, during the period between early January and midsummer of 1977, it was noted of Steed: that her visits to Attorney Williams' office were generally with her husband, and only "on

occasion" did she come alone; that when she came alone to sign documents prepared for her by Williams, she indicated she did not know what she was signing; that she had nothing to do with the daily operations of Parkway Development Corporation; that she never gave instructions to Williams or his secretary ; that she was not Lewis Allen's employer; that she visited the sales office only a couple of times; and that when she came, she merely walked around the office, visited with the sales staff, and did nothing as far as the business was concerned.

On June 6, 1977, Darlys Steed signed a contract for the sale of the Park Ridge Forest subdivision of Beasley's land to the Parkway Development Corporation. It was on this occasion that Beasley first met Darlys Steed. At this meeting she also signed a Comprehensive Statement to be filed with

HUD which contained the following statement:

> There is no additional land owned or under option or other consideration for purchase by the developer that might be offered as part of a common promotional plan.

Donald Williams subsequently mailed the Comprehensive Statement to HUD. Having thus filed, Parkway Development Corporation began to advertise and sell lots from Park Ridge Forest. Solicitation of purchasers was effected by means of mailgrams sent from Insentive Productions, a Memphis corporation owned by Darlys Steed. At some time later in the year, after the bulk of the lots in Park Ridge Forest had been sold, Williams Development Corporation (an entity owned by Donald Williams, and in which the Steeds had no interest) acquired a tract of land contiguous to Park Ridge Forest from Beasley and began to offer lots for sale. The solicitation for this subdivision, called Park Ridge West, was

through Incentive Productions. Sometime thereafter, Blue Ridge Development Coroporation, another entity in which the Steeds had no interest, began to solicit through Incentive Productions the sale of lots in another portion of Beasley's tract.

On March 21, 1977, a Federal Grand Jury returned an indictment against Darlys Steed charging her with one count of mail fraud (in violation of 18 U.S.C. §1341) and two counts of furnishing a false statement to HUD (in violation of 15 U.S.C. §1717), all based upon the allegedly false statement she made in the Comprehensive Statement. Steed plead not guilty to all counts of the indictment and the case was tried to a jury on August 21, 1979 with Chief Judge James C. Turk presiding.

On August 21, 1979, at the close of the Government's case in chief, Steed moved for judgment of acquittal on all three counts. Judge Turk granted her motion as

to Count Two for lack of evidence to support the allegation in the indictment and denied the motion as to Counts One and Three. At the close of the Defendant's case, defense counsel renewed the Motion for Judgement of Acquittal which Judge Turk took under advisement.

After deliberating for two hours, the jury returned verdicts of guilty on Counts One and Three. Defendant entered an oral motion for new trial and renewed its Motion for Judgement of Acquittal. On September 27, 1979, Defendant filed a written Motion for Judgement of Acquittal or New Trial.

On October 26, 1979, after oral argument in support of and against the Motion for Judgment of Acquittal or New Trial, the Court set aside the jury verdict and entered Judgment of Acquittal finding that the evidence was insufficient to support a verdict of guilty. In ruling on the Motion, the Court also said that it

would have granted a new trial based upon its conclusion that it had incorrectly denied defense objections to the admission of certain Government evidence.

In that the issues raised in this Court turn upon precisely what the trial court did, it is appropriate to quote at length from District Judge's statements at the hearing:

"And I will frankly say I thought there would be a verdict for the defendant. There was not, the jury found the defendant gulty as to both charges, but the Court feels that no rational finder of fact could have found proof beyond a reasonable doubt on the evidence that was before the jury at the time." (A 30).

"..... But I want to also say for the record that if the Court had found sufficient evidence for the jury's verdict, the Court would still have set aside the verdict in this case as to each count, because the Court feels like that the evidence as to the purchasers who came here and testified was highly prejudicial to the defendant and that the prejudicial [value] of their testimony far outweighed any probative value that their testimony might have had in the case." (A 31).

"..... I want also to say that even if the Court felt that there was sufficient evidence, the Court would still set aside the verdict and would have granted the defendant a new trial." (A 32).

The Government filed it's Notice of Appeal on October 26, 1979 and requested transcription of the trial proceedings on October 31, 1979. The case was briefed and argued to a three judge panel of the Fourth Circuit Court of Appeals which issued its opinion on April 9, 1981.

The panel opinion addressed the issues of the Government's right to appeal and evaluated the proper standard for review of the District Court's determination of the insufficiency of the evidence. Finding, in a 2-1 opinion, that the proper reviewing standard was absolute deference to the trial court, the panel affirmed the acquittal.

The Government filed a Request for Rehearing en banc which was granted and the Fourth Circuit, sitting en banc issued its opinion on March 25, 1982. The opinion reversed the trial court, finding that the proper standard for review was whether the

evidence, when taken in a light most favorable to the Government, supported the jury verdict. The Fourth Circuit Court found pursuant to this standard sufficient evidence to support the jury verdict.

The Fourth Circuit also addressed the issue of the trial court's granting of a new trial, quoting with approval Steed's brief saying that the District Court's language in effect granted defendant's motion for a new trial. The Fourth Circuit considers its authority to rule on the granting of the motion for new trial, finds that it has such authority and reverses, prior to any retrial, the grant of a new trial.

Steed seeks review of the Fourth Circuit's decisions regarding the standard of review and the authority for the government's right to appeal the trial court's grant of a new trial.

ARGUMENT

I The District Court's post jury verdict, fact-based determination that the evidence was insufficient to convict should be accorded absolute deference upon appeal.

This is a case of first impression in the United States Supreme Court and it entails resolution of a question which is critical to the proper administration of criminal justice. The trial court's long standing function in the criminal process encompasses a broad spectrum of obligation and concommitant discretion. The latitude of its discretion regarding its evaluation of the facts of a criminal case illustrates the importance which our system has accorded this role. This court has not had an opportunity to establish parameters for review of the district court's most fundamental and sacrosanct function. This case provides this Court with an

opportunity to determine the exact extent of this trial court function.

As this court has said in the United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), the differentiations in timing for a trial judge's entry of judgement of acquittal were "...intentionally incorporated into the rule [26] to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion." The rule recognizes the common law tradition of the judge's "right" to interrupt the criminal process at any stage and enter judgement of acquittal for the defendant. Indeed, the trial court's discretion is relatively immune from the government appeal; the inviolability of the court's decision is impinged upon only by the Criminal Appeal's Act, 18 U.S.C. §3731, enacted in its present form in 1971. This Act permits the United States to appeal from a decision of a district court

dismissing an indictment or information, or a suppression ruling which is not made after the defendant has been put in jeopardy, if the United States attorney certifies to the court that the appeal is not taken for the purpose of delay and that the evidence excluded it is a substantial proof of a material fact. It is clear that the government's right to appeal is narrowly circumscribed by the Act and, indeed, Mr. Justice Stevens, concurring in Martin Linen, supra has even pointed out that there is no statutory authority for an appeal of a judgement of acquittal pursuant to the Act. The deference accorded the district court's dismissal of criminal cases is both a necessary and proper function of the trial court in our criminal justice system.

This Court has said that the trial judge's latitude in dismissing criminal prosecution is designed "...to provide

additional protection to a defendant by filtering out deficient prosecutions, ..." Martin Linen, supra at 575. Illustrative of the importance of these functions is United States v. Sanabria, 437 U.S. 54 (1978). In Sanabria this court had occasion to reiterate the importance of finality with regard to a review of a district court's exclusion of certain evidence and on the basis of the remaining evidence entering a judgement of acquittal. The trial court in Sanabria had found the indictment's description of the offense too narrow to permit the admission of certain evidence. While characterizing this ruling as an erroneous evidentiary ruling, this court concluded that "...judgement of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appelate review of the trial court's error." (emphasis added), Sanabria, 437 U.S. 69. If the trial court's role in

weeding out deficient prosecutions is so important in our criminal justice system that this court both finds that the judge had made an erroneous ruling and yet bars review of that ruling, then, a fortiori, this court should not permit review of a trial court's evaluation of the facts presented in support of the government's case.

The only logical distinction between the court dismissing a case in midtrial or after discharge of a jury incapable of reaching a verdict and its dismissal in the case at bar is the time at which the judge decided to enter the judgement of acquittal. The time moment in the process at which the decision is made does not alter the court's function; it is performing the critical role of filtering out deficient prosecutions. The insufficiency of the evidence is no less insufficient prior to the jury's verdict

than afterwards. Until the 1970 Act, the trial court's ruling in the case at bar would have been shielded from review. Fong Foo v. United States, 369 U.S. 141, 143 (1962). The legislative history of the Act does not indicate that Congress intended to change this aspect of the court's function. The very language of the Act contains nothing which would permit an appeal of a judgement of acquittal entered subsequent to the jury verdict and this court has not yet had occasion to rule on the issue. Nevertheless, the legislative history and the Act itself illustrate no desire on the part of Congress to modify in any way that traditionally absolute power.

The Senate Report describes the purpose of the Bill as being "...to resolve serious problems which frequently have arisen with respect to the right of the United States to appeal rulings which terminate prosecutions other than by

judgements of acquittal..." S Rep No.91-1296, p.2 (1970). It goes on to say that the new Bill was designed to amend the old statute to provide for appealability of "...certain kinds of dismissals and suppressions." Id. 4. Furthermore, the Committee believed that the Constitution barred any appeal from an acquittal or from a dismissal amounting to an acquittal: "[a] true acquittal is based upon the insufficiency of the evidence to prove an element of the offense." Id. 11. As Mr. Justice Stevens said in his concurring opinion to Martin Linen, supra. at 580, 581:

> An attempt to authorize the Government to appeal from acquittals would have represented a radical change in the law....
>
> Interpreting legislative history is sometimes a complexing and uncertain task. In this instance, however, the legislative history is absolutely clear: Congress was interested solely in expanding the government's right to appeal from the dismissal of an indictment; it had no desire to allow appeals from acquittals and believed such

appeals would be unconstitutional. Therefore, Congress did not intend to give the appellant court authority to review a district court's fact-based finding that the evidence was insufficient to convict.

The foregoing analysis leads to the conclusion that the standard of review, if review is permissable, should be one of absolute deference. These are fact-based determinations, not resolutions of legal issues. The trial court is clearly in the best position to evaluate the sufficiency of the evidence and to apply his expertise as the arbiter of such evidence where it fails to rise to the level necessary to convict.

In reviewing the Fourth Circuit Court of Appeal's opinion in the case at bar, it is apparent that the Criminal Appeals Act has been presumed to have exercised a most significant function of the trial court: the ability to eliminate from our criminal

justice system the prosecutions which are factually deficient. The presumption is unfounded. A review of the Act itself and its legislative history which surrounds it discloses no support for the presumption. Had Congress intended to so radically alter hundreds of years of trial court experience, then surely it would have made specific and lengthy reference to such an intent. No mention of such an intent is found and therefore the conclusion is compelled that the presumption is false.

If the presumption that the appellate court may properly review the trial court's fact-based finding of insufficiency of evidence is false, then the standard of review ought to be one of absolute deference. This is not to say that the Government's right to appeal would be circumscribed as to other matters; legal determinations would still be subject to the same standard of review. Only factual

findings of insufficiency of the evidence would be subject to a standard of nonreview thereby preserving the critical role of the trial judge in the administration of criminal justice.

It might also be argued that the appellate court's review should not be eliminated entirely in these instances, but that some form of compromise between the attendant sanctity of the trial court's judgment and the government's desire to have an acquittal after a guilty verdict examined should be reached. It may be that there is some merit in allowing the appellate court to review such judgments, but at the same time maintaining the crucial importance of the trial judge's position vis-a-vis criminal jury trials.

The treatise writers have had occasion to note that the recent developments in this area have created the first real need to examine the trial court's discretion in

directing acquittals and, as they point out:

> The recent government appeal decisions can be justified much more easily if a more important and partly discretionary role is assigned to the trial judge. Factual control of the jury may be found an integral part of jury trial, a protection against the excesses of prosecution and jury combined that is as important as the jury's protection against possible excesses by prosecution and court combined. The trial judge's fact-based decision to acquit, based on the entire experience of trial, could well deserve protection against remote appellate control.

Wright, Miller & Cooper, Federal Practice and Procudure: Jurisdiction: §3919, p. 345 (1981 Pocket Part).

Therefore, the standard of review, should the Court find that there is one different from absolute deference, surely is not the one used by the Fourth Circuit in the case at bar. Taking the evidence in the light most favorable to the government is the standard applied to trial motions to acquit, there is no logic in applying it to

the appellate level. A standard more adequately protecting the trial court's role and his experience at trial would be that of an abuse of discretion where the appellate court would necessarily take into account the unique position that the trial courts have played in the history of the administration until the Steed decision threatens to drastically alter that role.

II The Fourth Circuit Court of Appeals could not reverse the district court's granting of a new trial prior to retrial.

This court has not had occasion to address the important issue raised by the instant case. There is a dearth of precedent in this area; no cases have been found in which the trial court entered both judgemnt of acquittal and granted the defendant's motion for a new trial on the same counts. However, as the Fourth

Circuit recognized (A 36), the trial court's language was tantamount to the grant of a new trial and it considered it as such. The Fourth Circuit opinion conflicts with other Circuits that have construed similar situations. The Fifth, First, Second and Ninth Circuits have all within the last five years decided that the Government may not appeal before retrial an order granting a new trial in a criminal case. United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979); In re United States, 565 F.2d 173 (1st Cir. 1977); United States v. Alberti, 568 F.2d 617 (2nd Cir. 1977); and United States v. Dior, 671 F.2d 351 (1982). Consequently, it is imperative that this court reslove this question so as to eliminate the apparent conflict between the Fourth Circuit and the other circuits mentioned.

The Analysis turns on a resolution of the two jurisdictional questions that arise

in a government appeal: (1) Whether there is statutory authority permitting the government to take the appeal and (2) whether the challenged order, decision or judgement itself is appealable. Dior, supra, at 356. Though this court has not resolved the issue specifically in a case of this kind, presuming that 18 U.S.C. §3731 grants the government the right to appeal and therefore satisfies (1), it does not follow that the order challenged is appealable. Both prongs of the jurisdictional test for the appellate court must be satisfied before the appeal may be brought. As the Fourth Circuit Opinion points out (A 18), Rule 33 of the Federal Rules of Criminal Procedure pertaining to the award of new trials does not deal with a situation in the case at bar. Citing Parr v. United States, 351 U.S. 513, 518 (1956), the Fourth Circuit finds that the final judgement rule (as found in 18 U.S.C.

§1291) applies in criminal as well as in civil cases. The court cites no precedent, but anologizes to Rule 50(c)(1) of the Federal Rules of Civil Procedure. And finds that it does have jurisdiction to review the trial court's award of a new trial to Steed. This decision conflicts with the other Circuit Courts that have had occasion to analyse the appealability of a grant of a new trial.

The government has no mandate which would permit it to appeal orders that are not final decisions. In other words, the government, too is subject to 18 U.S.C. §1291 and any orders which it is permitted to appeal must be final decisions in order to satisfy the second requirement of the jurisdictional inquiry which the appellant court must undertake. Judge Turk's grant of a new trial is not a final order within the meaning of §1291 and is therefore not appealable.

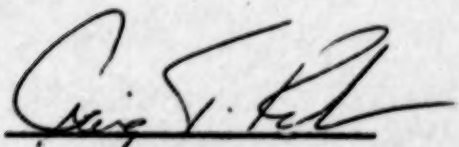
In Dior, supra. the Ninth Circuit Court of Appeals found overriding policy reasons which militate against the appealability of new trial orders before a retrial:

> The appellant review sought by the government is likely to interfere with the proper and efficient functioning of the district court. Appellate intervention in the trial process denies the district court the opportunity to apply its expertise and correct its own mistakes.

These policy considerations attend the grant of the new trial to Steed.

Judge Turk was present throughout the course of Steed's trial; he heard and observed the testimony of each witness and had occasion to examine the documentary evidence which was introduced by the government. It was his decision, based upon his expertise and his attendance and observation at the trial, that Steed's objection to the introduction of certain evidence should have been sustained. He

concluded, therefore, that he had made a mistake in overruling defense objection to the evidence and his grant of a new trial was the proper remedy for such a mistake. As was recognized in Dior, supra at 357, the proper and efficient functioning of the district court demands that the court be given the opportunity to correct its mistakes upon application of its expertise. Judge Turk has done so in this case and granted a new trial. The Fourth Circuit lacks authority to review such an award and the case should be remanded to the trial court for a new trial.



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MAILING CERTIFICATE

The undersigned counsel of record for the Petitioner, having been duly sworn, does hereby depose and say as follows:

(1) I have this 24th day of May, 1982 deposited forty (40) copies of this Petition for Writ of Certiorari in a United States mail box, with first-class postage prepaid, properly addressed to the Clerk of the United States Supreme Court within the time allowed for such filing pursuant to Rule 20 of the Rules of the United States Supreme Court, and

(2) I have this 24th day of May, 1982 deposited three (3) copies of this Petition for Writ of Certiorari in a United States mail box, with first-class postage prepaid, properly addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 pursuant to Rule 28.4.(a) of the Rules of the United States Supreme Court.

Craig T. Redinger

NOTARIAL CERTIFICATE

State of Virginia, at-large:

I, Kimberly A. Grupp, A Notary Public in and for the State of Virginia, at large, do hereby certify that the foregoing Mailing Certificate was duly sworn to by Craig T. Redinger this 24th day of May , 1982.

Kimberly A. Grupp

My commission expires: 2-3-86

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5294

United States of America, Appellant,

-v-

Darlys Foster Steed, Appellee,

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge.

Argued October 6, 1981
Decided March 25, 1982

Before WINTER, Chief Judge, and BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges.

John S. Edwards, United States Attorney, Jean B. Weld, Assistant United States Attorney for appellant; Craig T. Redinger for appellee.

BUTZNER, Circuit Judge:

The United States appeals from the district court's judgement of acquittal of Darlys Foster Steed after a jury found her guilty of mail fraud and furnishing a false statement to a government agency. We reach the following conclusions with resepct to the four issues the appeal raised: (1) we have jurisdiction to hear the appeal; (2) we can review the district court's assessment of the sufficiency of the evidence; (3) the district court erred when it held that evidence was insufficient to sustain the jury's verdict; (4) the district court did not err in the admission of evidence, and its alternative grant of a new trial is unwarranted. Consequently, we vacate the judgement of acquittal and remand the case for reinstatement of the

verdict of the jury and entry of judgement against Steed.[1]

I

Although the Supreme Court has not decided the precise jurisdictional question raised by this appeal, its decisions construing the Criminal Appeals Act of 1970, 18 U.S.C. §3731, and the double jeopardy clause of the fifth amendment dispense with the need for extended discussion. The Court has held that by enacting §3731 Congress "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975). Thus, the meaning of the double jeopardy clause becomes critical to the government's right of appeal.

Recently in the course reviewing the principles derived from this clause, the

Court pointed out that "the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact." United States v. DiFrancesco, 449 U.S. 117, 130 (1980). To illustrate this dictum, the Court cited two cases that held that the government could appeal judgements of acquittal based on the insufficiency of the evidence to sustain the verdicts of guilty.[2] The Court explained the rationale for this principle in United States v. Wilson, 420 U.S. at 344-45:

> [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that an order favoring the defendant could constitutionally be appealed by the Government. Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgement after a verdict

> has been entered against the defendant.... Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.

We therefore conclude that we have jurisdiction to hear the government's appeal, and we turn next to the question of the standard governing our review of the district court's judgement of acquittal.

II

At the onset, we cannot accept the suggestion that we must accord absolute deference to the district court's determination that the evidence is insufficient. This standard of review, now pressed by Steed on rehearing, initially was presecribed by the panel for reasons cogently stated in its opinion.[3] Admittedly, this practice would achieve symmetry in the disposition of all judgements of acquittal based on insufficiency of the evidence whether

granted before the case is submitted to the jury or after the verdict.[4] But the attainment of this goal would be at the expense of interests the Congress deemed important. By enacting 18 U.S.C. §3731 to enable the government to appeal adverse judgements unless the "Constitution prohibits further prosecution," Congress did not act on the basis of any perception that the trial judge should be permitted to assess the evidence conclusively. On the contrary, it expressed its preference for appellate review to the extent permitted by the double jeopardy clause. In short, insofar as the Constitution permits, Congress granted the government an appeal of right no less expansive than that accorded to defendants. This change in policy, wrought by the Criminal Appeals Act of 1970, cannot be given effect by creating a standard of review that defers absolutely

to the trial judge's assessment of the evidence.

The proper standard of review is enunciated in Glasser v. United States, 315 U.S. 60, 80 (1942): "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." This is the familiar standard for review of a defendant's claim that the evidence is insufficient to sustain the jury's verdict of guilty. Whether the assessment of the evidence is at the behest of the government or the defendant, the function of the reviewing court is unchanged and consequently the same standard of review is appropriate. This, too, is the conclusion reached by other courts that have reviewed post-verdict judgements of acquittal.[5]

III

The jury found Steed guilty of furnishing a false statement to the Department of Housing and Urban Development (HUD) in violation of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1717.[6] She also was found guilty of mail fraud for causing the false statement to be mailed to HUD in violation of 18 U.S.C. §1341.

After return of the verdict, the district court entered a judgement of acquittal because "no rational finder of fact could have found proof of guilt beyond a reasonable doubt on the evidence that was before the jury...."[7]

To sustain the charge of violating 15 U.S.C. §1717, the government had to prove that Steed willfully made an untrue statement of material fact in her application to HUD. See United States v. Steinhilber, 484 F.2d 386, 389-90 (8th Cir. 1973). To sustain the charge of mail

fraud, the government was required to prove that Steed participated in a scheme to defraud and that she caused the mails to be used to execute of further the scheme. See Pereira v. United States, 347 U.S. 1, 8 (1965). Both statutes require proof of a specific intent to defraud.

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701, et seq., is a comprehensive statute requiring subdivision developers, unless exempt, to furnish prospective purchasers pertinent information about lots offered for sale.[8] Among other things, the developer must disclose a description of access to the property, the availability of facilities for sewage, water, and other utilities, and the nature of the improvements to be installed by the developer. The Act subjects developers who furnish false information to both civil liability and criminal penalties.

Section 1702 authorizes the Secretary of HUD to exempt developers from complying with the Act if he finds enforcement is not necessary for the public interest because of the "small amount involved or the limited character of the public offering." Pursuant to this authority, the Secretary promulgated 24 C.F.R. §1710.14 (1974) exempting subdivisions of less than 300 lots that met certain other conditions. In addition to releasing the developer from complying with the Act, exemption substantially reduces the filing fee.

Steed was president and sole stockholder of Parkway Development Corporation, which was formed to sell 86 lots comprising a subdivision carved from a 460 acre tract owned by Thomas Beasley. Parkway, as a result of representations made by Steed that only 86 lots were involved, received an exemption from HUD. To procure this exemption, Steed certified:

"There is no additional land owned or under option or other consideration for purchase by the developer that might be offered as part of a common promotional plan." The indictment alleged that this statement was false.

Steed contends that the evidence was insufficient to show a common promotional plan and that even if there were such a plan, it evolved after she made the certification. Consequently, she asserts, the evidence was insufficient to show that she acted with fraudulent intent. At the most, she protests, she was simply a figurehead for her husband's and Beasley's enterprise.

Neither Steed nor her husband testified, so the jury had to ascertain from circumstantial evidence the extent of her knowledge about a common promotional plan to sell lots in more than one subdivision and whether she had a

fraudulent intent when she applied to HUD for the exemption. The proof established that Steed had experience in the promotion and advertising of subdivision lots. She owned and operated Incentive Productions, Inc., a Memphis, Tenessee company which engaged in this business. Her company received more than $66,000 from the sale of Parkway lots. In adition, she received over $40,000 in commissions and reimbursement for expenses.

The evidence also disclosed that if Beasley's 460 acre tract were marketed as a single subdivision, it would not qualify for exemption from the Act. To procure exemption, Beasley ultimately used three development corporations to offer lots in contiguous subdivisions. The first of these corporations was Parkway of which Steed was the president and sole stockholder. She did not own stock in the

other two. Parkway was allotted 86 lots, and Steed agreed that Beasley was to receive two-thirds of the profits from their sale. Thus, Steed knew that Beasley was participating in the receipts from the sale of land which he had formerly owned and which he had conveyed to Parkway. By the terms of the Act, 1701(4), Beasley was one of the developers of the Parkway subdivision. In her application to HUD, Steed did not disclose Beasley's silent interest.

The critical question raised by Steed is whether the evidence disclosed that she applied for the exemption with knowledge of Beasley's plans to market his remaining land through other contiguous subdivisions. If she were ignorant of his plans, there would be merit in her contention that her certification concerning the absence of a common promotional plan to sell the remaining lots, the jury could find that

she acted with fraudulent intent. There is proof that Steed's husband knew of Beasley's plan but no evidence that he in turn told Steed. Nevertheless, there is ample evidence from which the jury could find beyond doubt that Steed was also informed of Beasley's plans for other contiguous subdivisions.

The same lawyer represented the Steeds and Beasley. After he prepared the application for exemption, he explained it to Steed, her husband and Beasley. He specifically called their attention to the certification of the absence of a common promotional plan. He testified that he cautioned them as follows:

> As part of the promotional scheme, and this was discussed with everybody that there had to be separate sales offices, that there had to be separate sales managers, or teams, or whatever if you please, that each section would be autonomous in and of itself, that each one of the sub-divisions that were set up would function on its own feet, and it was set up for that purpose.

The only subdivisions the parties contemplated were those formed from the 460 acre tract. When the lawyer referred to "each section" and "each one of the sub-divisions," he was referring not merely to the Parkway subdivision but to the other subdivisions of the 460 acre tract. Thus, the jury was justified in finding that when Steed applied for the exemption, she was aware, contrary to her certification, that Beasley, who had a substantial, silent interest in Parkway, planned to subdivide his remaining land and that Parkway was simply a part of a common promotional plan to sell the whole 460 acre tract.

Notwithstanding the lawyers's advice, Steed's promotion company sent mailgrams offering sweepstake prizes to prospective purchasers of lots not only in the Parkway subdivision but in other contiguous subdivisions that were formed from the common tract. Furthermore, the same

project managers, salesmen, sales offices, and bookkeeper were used for all of the subdivisions. The evidence shows beyond doubt that Steed was aware of these arrangements and participated in them. Moreover, Steed did not confine her activities to the sale of the 86 Parkway lots. Almost seven months after these lots had been sold, Steed told an employee, who was concerned with the other subdivisions, that she was the boss. It is quite apparent that Steed did not consider herself to be a mere figurehead.

We therefore conclude that the evidence, viewed in the light most favorable to the government, amply supports the jury's verdict that Steed violated 15 U.S.C. §1717 by intentionally furnishing a false statement of material fact to HUD.

The evidence also sufficed to show that Steed caused the mail to be used to further the fraudulent scheme to deceive

HUD. Steed's lawyer acted on behalf of Steed and her corporation when he prepared and personally mailed Steed's signed application to HUD. The jury could find beyond a reasonable doubt that Steed knew that delivery of the papers to HUD was essential to the success of the scheme and that in the ordinary cause of business her lawyer would mail them. It was not necessary for the government to prove that Steed personally mailed the application. Proof that her lawyer, acting as her agent, mailed the papers or proof that use of the mails "can reasonably be foreseen" is sufficient to sustain the conviction. See Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Kenofskey, 243 U.S. 440, 443 (1917). Under either theory, the evidence is sufficient to sustain the verdict that Steed violated 18 U.S.C. §1341 by causing the mail to be used for the

purpose of executing the fraudulent scheme to deceive HUD.

IV

Before addressing the merits of the district court's conditional grant of a new trial, which the parties have fully briefed, discussion of our jurisdiction to review this aspect of the case is appropriate.[9] Quite understandably, Federal Rule of Criminal Procedure 33 pertaining to new trials, which was last amended in 1966, does not deal with a situation that could arise only after passage of the Criminal Appeals Act of 1970, 18 U.S.C. §3731. The Supreme Court, however, has pointed out that the same final judgement rule applies in criminal as well as civil cases. Parr v. United States, 351 U.S. 513, 518 (1956). We therefore turn to Rule of Civil Procedure 50(c)(1) to determine the scope of the

final judgement rule when a court grants judgement notwithstanding the verdict and conditionally grants a motion for a new trial. Under these circumstances, the finality of the judgement is not affected, and an appellate court can review the conditional grant of a new trial and in an appropriate case "reverse the conditional grant of the new trial and direct that judgement be entered on the verdict." Advisory Committee Notes to rule 50(c)(1). Conversely, the appellate court after reversing the judgement notwithstanding the verdict may allow the new trial.

Although we find no counterpart to rule 50(c)(1) in the criminal rules, we are satisfied that Parr, 351 U.S. at 518, permits us in this instance to conform the interpretation of the final judgement rule in criminal cases to the interpretation set forth in rule 50(c)(1). We therefore conclude that we have jurisdiction to

reverse the conditional grant of a new trial.

The district court admitted testimony of three persons who told about the misrepresentations and broken promises salesmen made to them when they purchased lots. Steed objected to the testimony of one of these witnesses on the ground that the misconduct of the salesman could not be attributed to her and that it was prejudicial. The admission of this testimony, however, was not assigned as a ground for a new trial in Steed's written motion. Nevertheless, at the hearing on the motion, although the government protested that it was taken by surprise, the court permitted Steed to argue that the prejudice caused by this testimony justified a new trial. The district court agreed and conditionally granted a new trial.

We have some doubt that Rule of Criminal Procedure 33 permitted the judge to grant a new trial on a ground not set forth in the defendant's motion. See United States v. Brown, 587 F.2d 187, 189 (5th Cir. 1979). But even if the court could implicitly allow Steed to supplement the motion by oral argument, we find no error in the admission of the evidence. The testimony of the purchasers disclosed that the promotion of the sale of the lots was conducted in a manner that the Interstate Land Sales Full Disclosure Act prohibited. It was relevant to the issue pertaining to Steed's intention in seeking an exemption from the Act. The government was entitled to show why exemption was important to Steed and Beasley. For these reasons, we cannot conclude that the probative value of the evidence was outweighed by prejudice. Cf. United States v. Amrep Corp., 560 F.2d 539, 545-46 (2d

Cir. 1977). Accordingly, we hold that the conditional grant of a new trial must be reversed.

The district court's judgement of acquittal and its conditional grant of a new trial are reversed, and the case is remanded for reinstatement of the jury's verdict and further proceedings consistent with this opinion.

PHILLIPS, Circuit Judge, dissenting:

With all the deference due from one occupying so outmanned a position, I respectfully dissent. The issue upon which I disagree with the court is of sufficient importance in the administration of criminal justice that it should at least be recognized as one not yet definitively addressed and resolved by the Supreme Court as that Court continues its exploration of the "relatively uncharted ground," see Comment, Double Jeopardy and Government

Appeals in Criminal Cases, 12 Colum. J. L. & Soc. Prob. 295, 302 (1976), opened by the Criminal Appeals Act of 1970 (the Act or 1970 Act).

As more fully developed in the superseded panel opinion of the court, 646 F.2d 136, I believe that our review of a post-verdict judgement of acquittal should be limited to correcting errors of "pure" law[1] and should not extend to reexamining a district judge's determination made under correctly understood legal principles that the evidence was "factually" insufficient to convict.

The majority opinion simply assumes, in its Part II, that our review must necessarily extend as well to a determination that the evidence was insufficient to convict, and that the standard of review is necessarily the traditional standard for reviewing, at a criminal defendant's behest, a trial

judge's unfavorable determination that the evidence was sufficient to convict. This assumption is not elaborated nor justified by the majority here, as it has not been by the other circuit courts that have made it. See 646 F.2d at 139 n.5. Implicit in it of course is the more fundamental assumption that by enacting the 1970 Act which allowed for the first time government appeals from post-verdict judgements of acquittal the Congress must have intended that this should be the standard of review. I do not think that assumption must or should be made.

Although in conjunction with the conferral of jurisdiction upon particular courts Congress may of course impose particular standards of review, e.g., 5 U.S.C. §706 (review of administrative agency determinations), it has not traditionally sought to do so in respect of criminal appeals, whether by defendants or

the government.[2] Where no standards of review have been legislatively imposed, their definition is necessarily left to the appellate courts which - so far as I know - have laid down all extant standards in criminal appeals. My view therefore is that in expanding the scope of jurisdiction to review government appeals, the Criminal Appeals Act of 1970 simply does not speak to the nature of this (or any) standard of review, so that its definition is necessarily left to the courts for ordering under developed principles pertaining to the appropriate relationship between federal appellate and trial courts in the administration of criminal justice.

As the superseded panel opinion pointed out, 646 F.2d at 139-40, before the Criminal Appeals Act of 1970 there was no developed judicial standard for reviewing trial court determinations of evidence insufficiency. Operating under predcessor

jurisdictional grants respecting both defendant and government appeals the courts had developed - without reference to the relevant jurisdictional grants - various standards for reviewing pure legal determinations both favoring and disfavoring defendants,[3] discretionary determinations running both ways,[4] and evidence sufficiency determinations disfavoring defendants.[5] But until the Criminal Appeals Act of 1970 first made possible any government appeals from post-verdict judgements of acquittal, no need or opportunity for developing or applying a standard by which to review the evidence sufficiency components of either pre- or post-verdict judgements of acquittal had been presented to the courts.

With both need and opportunity newly presented by the 1970 Act, I think the courts may and should now properly find the appropriate standard in the traditional

principle of finality which has attended fact-based judgements of acquittal by trial judges. While it is apparently now settled that except as it protects against retrial this finality principle is not derived from the Double Jeopardy Clause,[6] I would hold that it remains a fundamental right of criminal defendants that exists independently of double jeopardy considerations and that was not affected by the Criminal Appeals Act of 1970. I find in the various post-1970 Act Supreme Court decisions exploring the previously "uncharted ground" opened by the 1970 Act no outright or implicit rejection of that position.

Absolute finality is still insured for pre-verdict fact-based acquittals by their continued absolute jurisdictional insulation from any appellate review under the 1970 Act. See Sanabria v. United States, 437 U.S. 54 (1978). As more fully

developed in the superseded panel opinion, the failure to accord comparable finality to comparable post-verdict acquittals results in so great an anomaly and so severe a curtailment of the unique, traditional function of federal trial judges of unilaterally "filtering out deficient prosecutions," United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977), that I think it improper to ascribe such an unexpressed intention to Congress. See id. at 576-81 (Stevens, J., concurring). I would instead, simply exercising the traditional power of appellate courts to determine the proper standards of review where they are not legislatively imposed, apply here a standard of absolute deference to purely fact-based post-verdict judgements of acquittal in order to continue unimpaired that traditional, unilateral protective power and the concomitant historical right

of criminal defendants to have that particular nisi prius determination accorded absolute finality.[7]

On that basis, I would affirm the fact-based judgement of acquittal entered here by the district judge.

Judge Widener joins in this dissent.

PARTIAL TRANSCRIPT OF HEARING
ON MOTIONS - OCTOBER 26, 1979
BEFORE JAMES C. TURK, CIRCUIT JUDGE

THE COURT: Gentlemen, the case has given the Court a great deal of concern. It was the Court's feeling at the time that all of the evidence was in that evidence as to the two (2) counts going to the jury was weak. The Court, however, just took the motions under advisement and wanted to submit the case to the jury. And I will frankly say I thought there would be a

verdict for the defendant. There was not. The jury found the defendant guilty as to both charges, but the Court feels that no rational finder of fact could have found proof of guilt beyond a reasonable doubt on the evidence that was before the jury at the time.

So, the Court, under Rule 29C feels that it has to set aside the verdict of the jury and enter a judgement of acquittal in favor of the defendant as to each count.

Now, I'm frank to say, and I want to say for the record, the Court is aware of the fact that Mr. Steed and Mr. Beasley have been acquitted in the Circuit Court of Floyd County. And from the evidence that the Court heard here during this trial, I don't think anyone at all could disoute the fact that Mr. Beasley and Mr. Steed were the prime movers in the development. And it just does not seem to this Court fair to convict this lady, who was way out on the

perimeter, of a crime growing out of this development when Mr. Steed and Mr. Beasley have both been acquitted. It just does not seem justice.

Now, I sent the case to the jury, there's a jury verdict and the government has every right to appeal in this case and I hope that it will. But I want to also say for the record that if the Court had found sufficient evidence for the jury's verdict, the Court would still have set aside the verdict in this case as to each count, because the Court feels like that the evidence as to the purchasers who came here and testified was highly prejudicial to the defendant, and that the prejudicial of their testimony far outweighed any probative value that their testimony might have had in the case.

I think the Court was in error when it permitted these witnesses to testify. So, I'm hoping, if the goverment takes the case

to the Court of Appeals, the Court of Appeals will look at that facet of the case also. And if it is to come back, would advise the Court as to whether or not it would be proper to have admitted in evidence this testimony.

But the Court feels that there is not sufficient evidence in the case, looking at the evidence in a light most favorable to the government, drawing every reasonable inference that could be drawn therefrom, there just is not sufficient evidence to convict this lady of these charges beyond a reasonable doubt.

I also want to say that even if the Court felt that there was sufficient evidence, the Court would still set aside the verdict and would have granted the defendant a new trial. But in view of the posture of the evidence, the Court feels that it has no alternative but to set aside the jury verdict and enter up judgement of

acquittal for the defendant as to each count. And that will be done by the Court today.

FOOTNOTES

1. A panel held that this court had jurisdiction to hear the government's appeal but that it should defer to the trial court's assessment of the evidence. Accordingly, the panel affirmed the judgement of acquittal. United States v. Steed, 646 F.2d 136 (4th Cir. 1981). We granted the government's petition for rehearing en banc.

2. United States v. Rojas, 554 F.2d 938, 941 (9th Cir. 1977); United States v. DeGarces, 518 F.2d 1156, 1159 (2d Cir. 1975); accord, United States v. Dixon, 658 F. 2d 181, 187-88 (3d Cir. 1981); United States v. Boyd, 566 F.2d 929, 931-33 (5th Cir. 1978); United States v. Calloway, 562 F.2d 615, 616-17 (10th Cir. 1977); United States v. Blasco, 581 F.2d 681, 682-84 (7th Cir. 1978); United States v. Donahue, 539 F.2d 1131, 1133-34 (8th Cir. 1976).

Dictum to the contrary in United States v. Burroughs, 564 F.2d 1111, 1118 (4th Cir. 1977), can no longer be considered a guide to the law of this circuit.

3. See United States v. Steed, 646 F.2d 136, 139-43 (4th Cir. 1981).

4. When a judgement of acquittal based on insufficiency of the evidence is entered before the case is submitted to the jury,

the double jeopardy clause bars a second trial at which the government could attempt to remedy the deficiencies of its proof. Fong Foo v. United States 369 U.S. 141 (1962). The Court reached the same result in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), where the double jeopardy clause barred the government from appealing a judgement of acquittal based on insufficient evidence after the jury deadlocked. Reversal of the judgement would have subjected the defendant to a retrial on the issue of the sufficiency of the evidence.

5. See United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981); United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979); United States v. Blasco, 581 F.2d 681, 684 (7th Cir. 1978); United States v. Rojas, 554 F.2d 938, 943 (9th Cir. 1977); United States v. Calloway, 562 F.2d 615, 617 (10th Cir. 1977).

6. The district court granted a judgement of acquittal at the conclusion of the government's case on another count charging a violation of 15 U.S.C. §1717. The government has not appealed this judgement.

7. Other pertinent extracts from the court's oral opinion amplify its decision:

[T]he Court is aware of the fact that Mr. Steed and Mr. Beasley have been acquitted [of conspiracy to commit larceny by false pretenses] in the Circuit Court of Floyd County. And from the evidence that the Court heard here during this trial, I don't think anyone at all could dispute the fact that Mr. Beasley and Mr. Steed were the prime movers in the development. And it just does not seem to this Court fair to convict this lady, who was way out on the

perimeter, of a crime growing out of this development when Mr. Steed and Mr. Beasley have both been acquitted. It just does not seem justice.

...[I]f the Court had found sufficient evidence for the jury's verdict, the Court would still have set aside the verdict in this case as to each count, because the Court feels like that the evidence as to the purchasers who came here and testified was highly prejudicial to the defendant. And that the prejudicial [effect] of their testimony far outweighed any probative value that their testimony might have had in the case.

I think the Court was in error when it permitted these witnesses to testify. So, I'm hoping, if the government takes the case to the Court of Appeals, the Court of Appeals will look at that facet of the case also. And if it is to come back, would advise the Court as to whether or not it would be proper to have admitted in evidence this testimony.

But the Court feels that there is not sufficient evidence in the case, looking at the evidence in a light most favorable to the government, drawing every reasonable inference that could be drawn therefrom, there just is not sufficient evidence to convict this lady of these charges beyond a reasonable doubt.

8. Section 1701(3) provides:

"subdivision" means any land which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease by a single developer, or a group of developers acting in concert, and such land is contiguous or is known, designated, or advertided as a common unit or by a common name such land shall be presumed, without regard to the number of lots covered by

each individual offering, as being offered for sale or lease as part of a common promotional plan.

Section 1701(4) provides:

"developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision.

9. Steed's brief correctly notes that the court's statement from the bench "in effect grants defendant's alternative motion for a new trial." This seems also to be the intention of the district judge, for he observed that he expected this aspect of his ruling to be reviewed.

[1] See 646 F.2d 142 at & n.12.

[2] There are no legislative prescriptions of review standards either external to or within the current statutory grants of appellate jurisdiction over defendant, 28 U.S.C. §1291, or government, 18 U.S.C. §3731, appeals in criminal cases.

[3] The standard for reviewing legal determinations, whether favorable or unfavorable to defendants, is of course free review. See, e.g., United States v. Burroughs, 564 F.2d 1111 (4th Cir. 1977) (no legal error in post-verdict judgement of acquittal).

[4] The standard for reviewing discretionary rulings, whether favorable or unfavorable to defendants, is the traditional one of abuse. See, e.g., United States v. Wechsler, 406 F.2d 1032 (4th Cir. 1969) (per curiam).

[5] The standard for reviewing evidence sufficiency rulings unfavorable to

defendants is whether there is "substantial evidence, taking the view most favorable to the government." Glasser v. United States, 315 U.S. 60, 80 (1942).

[6] This much is implicit in the expressed view of a clear majority - perhaps the whole - of the Supreme Court that because the double jeopardy has attached, post-verdict acquittals are not absolutely immunized from appellate review of the double jeopardy limitations built into the jurisdictional grant of the 1970 Act. See, e.g., United States v. Wilson, 420 U.S. 332, 342 (1975) (post-verdict acquittal for pre-indictment delay appealable); but cf. United States v. Martin Linen Supply Co., 430 U.S. 564, 576-81 (1977) (Stevens, J., concurring: Congress did not intend by 1970 Act to allow appeals from acquittals, "and believed such appeals would be unconstitutional"; constitutionality of allowing such appeals not questioned).

[7] Fixing the appropriate standard of review is simply an incident of the broader power necessarily had and traditionally exercised by appellate courts ultimately to order - to the extent the legislature has not - the functional relationship between appellate and trial courts in their combined efforts to reach at last proper judgements in particular cases. This power extends not only to defining by "standards" the intensity with which particular trial court actions are reviewed but to fixing through the use of such purely judicial concepts as "plain error" the scope ambit of those actions that are properly subject to review. Critical to the exercise of that judicial power in both its intensity and scope dimensions is a determination of the appropriate locus of finality for deciding particular legal or factual

issues. In making that determinationm appellate courts have always properly considered such diverse factors as maintenance of the adversary system, relative vantage points of the different levels of courts, ultimate importance of the determination, and the nature of the substantive interests affected. Many of the resulting standards and scope rules accord substantial or total finality to trial court actions that lie within the jurisdictional reach and corrective power of appellate courts on a perception that - for any number of these reasons - a particular trial court determination should be final even if "wrong." There is, in consequence, nothing conceptually unsound nor at odds with traditional practice in according, through the device of different standards of review, finality to trial court determinations that evidence is insufficient to convict while according, by the same judicial process, non-finality to trial court determinations that it is sufficient. The ordering principle is that ancient one which at many points slants - and at this very point has always slanted - the system in ways calculated to favor the criminal defendant in matters pertaining to factual proof of his guilt. See 646 F.2d at 140-142 & nn.8, 9. Certainly the possibility that different standards might be appropriate here is not so untoward that a legislative intent to deny that possibility should be simply assumed. That, I submit, is nevertheless the majority's sole rationale on this decisive issue. The assumption is that our traditional power in this realm has been denied by a jurisdictional grant that does not speak to it.

See 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure:

Jurisdiction and Related Matters, §3919, at 356 (1981 Pocket Part), where it is suggested that such a standard of review might appropriately be adopted by the courts notwithstanding the government's right to appeal such post-verdict judgements under the 1970 Act.

No. 81-2180

In the Supreme Court of the United States

OCTOBER TERM, 1982

DARLYS PORTER STOUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was required to accord absolute deference to the district court's post-verdict judgment of acquittal.

2. Whether the court of appeals had jurisdiction to review the district court's conditional grant of a new trial when the district court's judgment of acquittal on the same counts was already before the court of appeals.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A29, A33-A39) is reported at 674 F. 2d 284. The earlier opinion of the panel is reported at 646 F. 2d 136.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of submitting a false statement to the Department of Housing and Urban Development (HUD), in violation of 15 U.S.C.

1717, and of mail fraud, in violation of 18 U.S.C. 1341.[1] Petitioner was the owner of a subdivision consisting of 86 lots (Pet. App. A10, A13). In June 1977, she filed an application with HUD for exemption from certain filing requirements under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.* ("the Act").[2] In that statement petitioner represented that no developer of her property owned or had under option or consideration for purchase other land that might be offered as part of a common promotional plan (Pet. 6-7; Pet. App. A10-A11). The evidence at trial showed, however, that petitioner was aware that another individual, Thomas Beasley, qualified as a developer of her subdivision and that Beasley owned additional land that would be marketed under a single promotion with petitioner's property.

Thomas Beasley was the owner of a 460-acre tract of land (Pet. App. A10). In order to obtain an exemption from filing requirements of the Act that was available for subdivisions with fewer than 300 lots, Beasley used three development corporations to sell lots in contiguous subdivisions carved from his property (*id.* at A12). One of the

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[1]At the close of the government's case the district court granted a judgment of acquittal on an additional count of submitting a false statement to HUD in violation of 15 U.S.C. 1717. That count is not at issue in this appeal.

[2]The Act requires subdivision developers to file extensive information about lots that are offered for sale, including information concerning access to the property, the availability of sewer facilities, water, and other utilities, and the nature of improvements to the property that the developer intends to make. Section 1702 allows the Secretary of HUD to exempt certain developers from these requirements where a subdivision contains a small number of lots. The Secretary determined that subdivisions containing fewer than 300 lots would be exempt from the filing requirements. 24 C.F.R. 1710.14 (1974). Such an exemption substantially reduces a developer's filing fee (Pet. App. A10).

subdivisions, consisting of 86 lots, was conveyed to Parkway Development Corporation, of which petitioner was president and sole stockholder (*id.* at A12-A13). Under an agreement between petitioner and Beasley the latter was to receive two-thirds of the profits from the sale of the 86 lots (*id.* at A13). Although this financial interest brought Beasley within the definition of a "developer" of the 86-lot subdivision, petitioner did not disclose the interest in the exemption application she filed with HUD (*id.* at A13).

The evidence indicated that petitioner was aware of Beasley's plan to market both the 86-lot subdivision and his remaining land in other contiguous subdivisions under a common promotional plan. The lawyer who represented petitioner, her husband, and Beasley testified that he specifically called their attention to the certification of the absence of a common promotional plan after he prepared the application for exemption (Pet. App. A14). Incentive Productions, Inc., a promotion company owned by petitioner, engaged in promotional activities with respect to both petitioner's 86 lots and the contiguous subdivisions (*id.* at A12, A15). Incentive Productions received over $66,000 from sale of lots, and petitioner herself received over $40,000 in commissions and reimbursement for expenses (*id.* at A12). The evidence showed that petitioner knew that the same project managers, salesmen, sales offices and bookkeeper were used for all of the subdivisions (*id.* at A15-A16).

Following the jury's return of a guilty verdict the trial court granted a judgment of acquittal, stating that on the evidence before the jury no rational finder of fact could have found proof of guilt beyond a reasonable doubt (Pet. App. A30). The trial court appears to have based that conclusion in part on the fact that petitioner's husband and Beasley had been acquitted in a state court of criminal charges relating to the development scheme (*ibid.*). The trial

court further stated that even if the evidence had been sufficient to support the conviction it would have granted a new trial on the ground that admission of the testimony of certain purchasers of the lots had been erroneous (*id.* at A31-A32).

The government appealed from the judgment of acquittal pursuant to 18 U.S.C. 3731. A panel of the court of appeals affirmed. It held that a district court's post-verdict judgment of acquittal was appealable, but that it should be insulated from review in a manner similar to a nonappealable pre-verdict decision to grant acquittal. Accordingly, the panel held that a post-verdict acquittal based on assessment of the evidence at trial was to be accorded "absolute deference." 646 F. 2d 136, 139-143 (1981).

On rehearing en banc, the court of appeals reversed, with two judges dissenting. The en banc court held that a post-verdict judgment of acquittal should be reviewed according to the same standard used in reviewing a defendant's challenge to a jury's guilty verdict, namely, whether there is substantial evidence, viewed in the light most favorable to the government, to support the verdict (Pet. App. A7). After reviewing the evidence at trial in light of that standard, the court found that there was substantial evidence to sustain the guilty verdict (*id.* at A8-A18). The court also held that it had jurisdiction to review the trial court's conditional grant of a new trial, and that there had been no error in admission of the purchaser testimony and thus no basis for ordering a new trial (*id.* at A18-A22).[3] Accordingly, the court reversed the district court's judgment of acquittal and its conditional grant of a new trial and remanded for reinstatement of the jury's verdict and further proceedings consistent with the court of appeals' opinion (*id.* at A22). The

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[3]The court of appeals interpreted the trial court's statements from the bench as a conditional grant of a new trial. See Pet. App. A36 n.9.

dissenters urged the panel's conclusion that a court of appeals should grant absolute deference to a district court's judgment of acquittal when such a judgment is based on a finding of evidentiary insufficiency (*id.* at A22-A29).

ARGUMENT

1. Petitioner contends first that the court of appeals should have accorded absolute deference to the district court's judgment of acquittal (Pet. 13-24). This contention has no merit. Every court that has addressed the subject, with the exception of the panel below, has held that the proper standard for review of a trial court's judgment of acquittal is the one applied by the en banc court. That standard is whether there was relevant evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. See, *e.g.*, *United States* v. *Dixon*, 658 F. 2d 181, 188 (3d Cir. 1981); *United States* v. *Brandon*, 633 F. 2d 773, 780 (9th Cir. 1980); *United States* v. *Beck*, 615 F. 2d 441, 447-448 (7th Cir. 1980); *United States* v. *Varkonyi*, 611 F. 2d 84, 85 (5th Cir.), cert. denied, 446 U.S. 945 (1980); *United States* v. *Blasco*, 581 F. 2d 681, 684 (7th Cir.), cert. denied, 439 U.S. 966 (1978); *United States* v. *Calloway*, 562 F. 2d 615, 617 (10th Cir. 1977); *United States* v. *Hemphill*, 544 F. 2d 341, 344 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977). That standard is the same one that this Court has approved in cases in which a criminal defendant challenges a jury's guilty verdict on the ground of evidentiary insufficiency. See *Burks* v. *United States*, 437 U.S. 1, 16-17 (1978); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Petitioner devotes a considerable portion of her petition to questioning the proposition that the government may appeal a post-verdict judgment of acquittal under 18 U.S.C. 3731 (Pet. 14-20). Contrary to petitioner's suggestion,

however, it is well established that the government may do so. See *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980); *United States* v. *Scott*, 437 U.S. 82, 91 & n.7 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States* v. *Wilson*, 420 U.S. 332 (1975). See also *United States* v. *Rojas*, 554 F. 2d 938, 941 (9th Cir. 1977), and *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (2d Cir. 1975), which were cited by this Court in *DiFrancesco, supra*, 449 U.S. at 130. Even the panel below stated that "any suggestion of nonappealability is foreclosed * * * by a proper reading of the Supreme Court decisions * * *." 646 F. 2d at 137.[4] As this Court recognized in *Wilson, supra*, the legislative history of the 1970 enactment of 18 U.S.C. 3731 "makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeal whenever the Constitution would permit." 420 U.S. at 337. The en banc court of appeals here properly recognized that any standard of absolute deference to the trial court would fail to give effect to the congressional intent underlying the 1970 legislation (Pet. App. A6-A7). See also *United States* v. *Dixon, supra*, 658 F. 2d at 188, in which the Third Circuit observed that the absolute deference standard adopted by the panel in this case "takes away what the statute grants."

Petitioner argues that any standard of review other than absolute deference would interfere with the "sacrosanct" function of the district court (see Pet. 13). Quite the opposite is true. It is the jury's "sacrosanct" role as the sole trier of

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[4]Petitioner makes much of this Court's holding in *United States* v. *Sanabria*, 437 U.S. 54 (1978) (Pet. 16-17). However, *Sanabria* has no relevance to this case. In *Sanabria* the trial court entered a judgment of acquittal prior to a jury verdict and this Court found that the Double Jeopardy Clause barred any further prosecution. In the present case reversal of the judgment of acquittal does not necessitate a retrial, but only a reinstatement of the jury's guilty verdict, so that no double jeopardy problem arises. See *Sanabria, supra*, 437 U.S. at 63; *United States* v. *Wilson, supra*, 420 U.S. at 344.

fact in criminal cases (see, *e.g.*, *Burks* v. *United States*, *supra*, 437 U.S. at 16-17; *Singer* v. *United States*, 380 U.S. 24, 35 (1965) that would be usurped by permitting the trial court to discard the jury's verdict on legally erroneous grounds. The standard of review applied by the en banc court and by other courts of appeals in the cases cited above reflects proper deference to the fact-finding function of the jury, while simultaneously allowing exercise of the conventional function of appellate courts to review conclusions of law. Petitioner's advocacy of an unprecedented standard of review that would accord absolute deference to the trial court, and no deference to the verdict of the jury, does not warrant review by this Court.[5]

2. Petitioner contends (Pet. 24-29) that the court of appeals lacked authority to review the district court's conditional grant of a new trial concurrently with its review of the district court's judgment of acquittal. Petitioner argues that the court of appeals' conclusion that it had jurisdiction to review the conditional grant conflicts with the position of four other circuits, which have held that an order granting a new trial in a criminal case is not appealable (Pet. 25). In support of this argument petitioner cites *United States* v. *Hitchmon*, 602 F. 2d 689 (5th Cir. 1979) (en banc); *In re United States*, 565 F. 2d 173 (1st Cir. 1977); *United States* v. *Alberti*, 568 F. 2d 617 (2d Cir. 1977); and *United States* v.

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[5]Almost as an afterthought, petitioner suggests that if the proper standard of review is not found to be absolute deference, it should be abuse of discretion (Pet. 23-24). Petitioner cites no authority to support application of this alternative standard to review of a trial court's post-verdict judgment of acquittal. As noted in the text, *supra*, all courts of appeals that have considered the question have found the standard of review applied by the en banc court in this case to be the proper one.

Dior, 671 F. 2d 351 (1982). See also *United States* v. *Sam Goody, Inc.*, 675 F. 2d 17 (2d Cir. 1982).[6]

Petitioner's contention is without merit. The cases cited above address only the question whether an order granting a new trial is appealable when standing alone. As petitioner acknowledges (Pet. 24), in none of the cases she cites did the trial court both enter a judgment of acquittal and conditionally grant a new trial on the same counts, as it did in this case. Thus, the court of appeals decision here presents no conflict with the cases cited, there being no reason to suppose that the other circuits would not reach the same result if confronted with the same situation.[7]

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[6]We do not here concede that an order granting a new trial in a criminal case is not a final, collateral order appealable under the doctrine of *Abney* v. *United States*, 431 U.S. 651 (1977), and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But as we demonstrate in the text, this case turns on special factors not generally applicable to the appealability of new trial orders, and therefore does not place in issue the correctness of the decisions cited by petitioner.

[7]Of the cases cited by petitioner, only *United States* v. *Dior* might arguably be considered relevant to the present case. However, *Dior* is plainly distinguishable. In *Dior* the district court had granted a post-verdict judgment of acquittal on one count, based on the prosecution's failure to prove the value in United States dollars of certain stolen merchandise. The district court granted a new trial with respect to a different count on the entirely distinct ground that the jury had been given an incorrect instruction. On appeal, the Ninth Circuit upheld the judgment of acquittal and declined to review the new trial order, holding that the latter did not constitute a final judgment and thus was not appealable. Unlike the situation in the present case, the judgment of acquittal and the new trial order in *Dior* related to different counts and raised very different issues. Moreover, the Ninth Circuit does not appear to have even considered the possibility that its jurisdiction to review the judgment of acquittal permitted it to exercise pendent jurisdiction over the new trial order. Thus, *Dior* does not conflict with the present case.

Moreover, the holding of the court of appeals that it had jurisdiction to review the conditional grant of a new trial under the particular circumstances of this case is correct. The court of appeals' exercise of jurisdiction is directly authorized by 28 U.S.C. 2106, which states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Thus an appellate court that has jurisdiction to review a case is not prevented from reviewing portions of the case that otherwise would be nonappealable. As Moore states:

> The appellate court is not * * * limited solely to a consideration of the order upon which the appeal is based, for its jurisdiction embraces such other orders, although interlocutory and in themselves nonappealable, and such questions as are basic to and underlie the order supporting the appeal.

9 Moore's *Federal Practice* para. 110.25[1], at 270 (2d ed. 1982). Moore goes on to note, "[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." *Id.* at 273. See also, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 286-287 (1940).

Moreover, although the Federal Rules of Criminal Procedure do not address the scope of review in a case in which the trial court has entered both a judgment of acquittal and a conditional order of a new trial,[8] the court of

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[8] As the en banc court of appeals noted (Pet. App. A18), Fed. R. Crim. P. 33, pertaining to new trials, was last amended in 1966 and thus does

appeals reasonably concluded (Pet. App. A18-A19) that it was appropriate to look for guidance to the Federal Rules of Civil Procedure, since the final judgment rule applies in both criminal and civil cases. Fed. R. Civ. P. 50(c)(1) provides that when a court grants judgment notwithstanding the verdict and conditionally grants a motion for a new trial the finality of the judgment is not affected. An appellate court can review the conditional grant and, where appropriate, "reverse the conditional grant of the new trial and direct that judgment be entered on the verdict." Advisory Committee Notes to Rule 50(c)(1).[9] Because the final judgment rule does not bar such a procedure in civil cases, the court of appeals found no reason why it should do so when a similar situation arises in a criminal case (Pet. App. A19-A20). The procedure described in Fed. R. Civ. P. 50(c)(1) is, of course, simply an application of the principle set forth in 28 U.S.C. 2106.

In the present case the court of appeals unquestionably had jurisdiction to review the district court's judgment of acquittal. See the authorities cited under point 1, *supra*. Thus, it also could review other orders that arguably were otherwise non-final and non-appealable. Review of both the judgment of acquittal and the conditional order of a new trial in this case required an evaluation of the evidence presented to the jury.[10] Reversal of the erroneous order of a

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not address situations that could arise only after the 1970 passage of the Criminal Appeals Act, 18 U.S.C. 3731.

[9]The Advisory Committee noted that this procedure had been followed by courts prior to the 1963 amendment that added subsection (c). See, *e.g.*, *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.), cert. denied, 364 U.S. 835 (1960); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968 (1958).

[10]See, *e.g.*, *General Motors Corp.* v. *City of New York*, 501 F. 2d 639, 648 (2d Cir. 1974) (appellate court should consider whether review of the appealable order will involve consideration of factors relevant to the otherwise non-appealable order).

new trial was in the interests of efficient litigation, since it resulted in saving the time the trial judge and the parties otherwise would expend in a retrial.[11] Therefore, it was plainly appropriate for the court to review both orders and remand for reinstatement of the jury's verdict.[12]

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[11]See, *e.g.*, *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F. 2d 67 (2d Cir.), cert. denied, 385 U.S. 971 (1966) (noting obvious interest in economy of litigation underlying the pendent jurisdiction doctrine).

Petitioner cites *United States* v. *Dior*, *supra*, for the proposition that appellate review of new trial orders prior to retrial denies the district court the opportunity to correct its own mistakes (Pet. 28-29). But the only "mistake" petitioner cites in this case is the district court's admission of purchaser testimony. Because the court of appeals concluded that admission of this evidence was proper, there is no mistake to be corrected.

[12]We are aware of at least one other criminal appeal in which the court of appeals simultaneously reviewed a judgment of acquittal and the conditional order of a new trial that accompanied it. See *United States* v. *Brown*, 587 F. 2d 187 (5th Cir. 1979). The propriety of the court of appeals' exercise of pendent jurisdiction in the present case is not affected by the statement of this Court in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978), that it had concluded in *Abney* v. *United States*, 431 U.S. 651 (1977), that a court of appeals lacks pendent ju isdiction over otherwise non-appealable claims even when they are joined with a double jeopardy claim over which the appellate court has interlocutory appellate jurisdiction. The Court in *Abney* had concluded that the special nature of a double jeopardy claim brings it within the "collateral order" exception to the final judgment rule, but that similar considerations do not extend to most other interlocutory claims. The Court in *Abney* was concerned with the possibility that criminal defendants would assert frivolous double jeopardy claims in order prematurely to bring more serious, but otherwise non-appealable, questions to the court of appeals prior to conviction and sentence. 431 U.S. at 663. No such concern is present here, where the appeal was not from an interlocutory order, but from a final judgment of acquittal following a guilty verdict. See, *e.g.*, 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3937, at 95 n.5 (Supp. 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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